It is to the mere intimation of a doubt by a plurality of the Barons in *Rex* v. *Humphrey*, that we owe the vague impression of a possible difference between the lien of warehousemen and wharfingers. Ordinarily the wharfinger's charges accrue for the mere passing over his wharves of freight, in the loading and unloading of cargo; he expends no labor or skill upon the goods, and has but the slightest tenure of possession; whereas, in the storing of goods, the warehouseman has a continuous and well-defined possession, and bestows labor and skill upon them. However, we take it, upon principle and authority, there is no substantial difference.

While the cases in Espinasse's Reports were determined at *nisi prius*, yet the eminence of the jurists who presided, of the counsel employed, with the universal acquiescence signified by the lapse of three-quarters of a century without their being disturbed, together with the confirmation they received in the Exchequer of Pleas from *Rex* v. *Humphrey*, have impressed upon them the stamp of very respectable authority.

ROBT. G. STREET.

GALVESTON, Texas.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

JOHN STANTON AND WIFE *v.* HAVERHILL BRIDGE CO.

The question of the competency of a foreign corporation to be sued is admitted by a general appearance from term to term and filing no dilatory plea.

A bridge corporation, which demands and receives tolls of travellers, is bound to keep its bridge and approaches in safe condition for use, and cannot excuse itself by impeaching its own title to maintain the same.

THIS was an action on the case by a toll-paying traveller to recover damages for a personal injury to the wife, accruing from the insufficient condition of defendant's bridge across Connecticut river. The other facts appear in the opinion, which was delivered by

REDFIELD, J.—I. However defective was the service of this process, we think the appearance of the defendant, by counsel, at the first term, and suffering a general continuance for that and the succeeding term of the court, is a waiver of all dilatory pleas, and

of all objection to the service of the writ: *Huntley* v. *Henry et al.*, 37 Vt. 165; *State* v. *Richmond*, 6 Foster 232. "A voluntary and general appearance in an action not only gives jurisdiction of the parties, but cures any irregularity in the service of the process:" *Carpenter* v. *Minturn*, 65 Barb. The defendant's plea does not allege or claim that the writ was not properly served, but that the defendant, being a foreign corporation, existing and doing business under the laws of New Hampshire, and having no franchise or property in this state, the courts in this state could not take or have jurisdiction of the persons or the subject-matter of this suit. The replication avers that the defendant is the owner of land in this state, on which the western abutment of the said bridge stands, and that the injuries complained of accrued by reason of the insufficiency in that part of said bridge. The general appearance, and continuance of the case, without objection to the service, was a waiver of all questions as to the regularity of the service, and a voluntary submission to the jurisdiction of the court over the *person* of the defendant. And the facts averred in the plea or replication could neither give nor take away such jurisdiction. It has often been held that the courts of this state may take jurisdiction of a foreign corporation when properly impleaded, and that a general appearance by an attorney gives such jurisdiction: *Hall* v. *Vt. & Mass. R. R. Co.*, 28 Vt. 409. The case of *March* v. *Eastern R. R. Co.*, 40 N. H. 551, is a thorough examination of this subject.

II. The more important inquiry is as to the liability of the defendant for damages occasioned by the insufficiency of the bridge at the place of injury. This defendant had its artificial being by an act of the legislature of New Hampshire, and could not do strictly corporate acts without that jurisdiction. But there seems no question that a corporation may act, by its agents and servants, beyond the limits of the sovereignty that created it: 1 Redfield on Railways 57.

If the liability of the defendant were limited by the western boundary of New Hampshire, a traveller who had paid toll, and thereby obtained defendant's contract and guaranty for safe passage across its bridge, would be without remedy for injuries received from defective planking in the westerly end of the main bridge, because the western abutment and western end of the main bridge was without the state of New Hampshire and within Ver-

mont; and that would be relieving the defendant from liability for breach of its contract, implied by taking toll, and from the duties it had assumed to the travelling public, because it occupies, and cannot discharge its proper functions without occupying, a portion of the soil of Vermont. The defendant has occupied the land within this state for its abutment and bridge, and used the same for public travel, for near forty years; and continuously invited travel, for toll, over its structure, without molestation, under a claim of right, and with the implied possession of the sovereignty of this state. And there would seem no good reason, in morals or law, that the defendant should be excused from the performance of its contract by alleging that the duties it had assumed were beyond its corporate functions.

Joint-stock companies, for mining and other purposes, and sometimes for mere mischief, like the "*Credit Mobilier*," often have their corporate life and being from the grant of one state, and exercise their entire functions in another state or territory; yet its contracts are binding on the corporation, though its charter might be vacated, or such acts enjoined by proper proceedings in equity: *Miller* v. *Ewen*, 27 Mo. 509; 1 Redf. on Railw. 57, note.

The Boston, Concord & Montreal R. R. Co. was created by act of the legislature of New Hampshire, yet the corporation has extended its railway some one hundred miles into this state, to a junction with other railways in this state, and have been carrying passengers and freight over that portion of its road for twenty years. The sovereign power of this state was invoked in the Supreme Court to prevent the exercise of such rights, but without avail: *State* v. *B., C. & M. R. R. Co.*, 25 Vt. 443. Although it is the prerogative right of this state to prevent that corporation from operating its railway within this state, yet reason, justice and all analogy would require that such corporation should be responsible for its contracts and the performance of the duties which it assumes, and that a passenger, who had paid his fare from Concord to Wells River, if injured by the actionable carelessness of the corporation, on this portion of its railway, might require it to respond in damages. The corporation could not be excused from doing what, upon sufficient consideration, it had agreed to do, by alleging its incapacity to enter into such a contract. In *McCluer* v. *Manchester & Lawrence R. R. Co.*, 13 Gray 124, the defendant corporation, existing under the laws of New Hampshire, received

goods to carry from some point in Massachusetts to Manchester, N. H., and the goods were lost, by the carelessness of the carriers, in Massachusetts. The defendant alleged in defence that it had no legal capacity to contract, or become responsible as carriers, without the state of New Hampshire. The court (HOAR, J.) held otherwise, and said, "they were in actual possession and *use* of the road, without obstruction from the Commonwealth; and they received the plaintiff's property, and agreed that it should be safely kept and transported to its destination. It is no answer to a breach of that agreement to deny the validity of their own contract." So this defendant, for good consideration, agreed to give safe passage to the plaintiff upon its bridge across Connecticut river; and if plaintiff was injured by the neglect of defendant to keep and maintain its bridge in safe condition, it is neither a just nor legal response to such claim to damages for this broken contract and wrong to such traveller, to aver that there is *doubt* about defendant's right to occupy the land on which the bridge rests. As between the traveller and the defendant, the former has no concern with the defendant's *right* or *title;* it is enough that the corporation was in possession and the traveller paid for the use of the bridge. But it is insisted that the place where the injury occurred is outside the bridge. The place of injury was in the inclined planking, about four feet wide, descending from the level flooring of the main bridge to the road-bed made of earth. This was fastened to the main structure by spikes, and the roof of the bridge extended over and beyond it. It was the transit platform from the main framework of the bridge to land, made by defendant when the bridge was constructed in 1834, and maintained and used by defendant for toll-paying passengers ever since; and without this or some similar provision, it is evident that travellers could not pass and repass with facility or safety. The bridge was imperfect without it.

III. It is insisted that this portion of the bridge is upon and over the highway, as established by law in the town of Newbury, in this state. The record of the highway as established is as follows, viz.: "beginning at the westerly end of the planking in the main bridge over Connecticut river (it being understood and agreed that the proprietors of said bridge always keep in repair the *wharfing* by them made)."

It would seem that the bridge and wharfing had been made and

completed when the highway to meet it was established; and as between the town of Newbury and the defendant, the latter assumed to keep the wharfing to the bridge in repair. Whether the defendant would be liable to a traveller for an injury by reason of an insufficient wharfing, or for the want of a railing on the approaches to the bridge, being a portion of the structure which the defendant is bound to keep in repair, and for the *use* of which toll was taken, the case does not require us to discuss or decide.

This *apron* of the bridge was essentially a part of the bridge. It was constructed with and as a part of it in 1834. It has ever been made fast to the framework of the bridge. It is necessary to enable travellers to pass to the wharfing and upon the highway. It is a necessary part of the structure to enable travellers to pass from the highways of one state to those of another, for which purpose the defendant was incorporated, and for the use of such structure the defendant has for the last forty years taken toll.

The fact that a portion of such structure is over a highway, even if such highway were established without any condition that defendant should ever keep it in repair for the safety of travellers, is no reason why defendant should not perform its contracts or discharge the duties it had assumed.

In *Davis* v. *Lamoille Plank Road Co.*, 27 Vt. 604, it appeared that the defendant, in constructing its plank road, had occupied the established highway in the town of Stowe. By contract with said town, the company had agreed to protect the town from all damages occasioned to travellers by reason of an insufficient road. The corporation defended on the ground that the town were alone liable; but the court held otherwise. And Chief Justice REDFIELD, in giving the opinion of the court, says: "If it could be maintained (which we think it could not) that the town of Stowe were liable for giving up their highway before the defendants had built a proper plank road, it would not excuse the defendants, after opening their road and taking tolls; * * the liability to pay tolls is a consideration for the undertaking, on the part of the corporation, to furnish a safe road for the use of the travellers as an equivalent. It is the same in principle as any other contract where service is performed for pay. There is an implied undertaking, from the general rules of law applicable to such subjects, that the person undertaking such service, whether it be a natural or artificial person, shall perform it faithfully."

The claim of the defendant, that it intruded itself upon another's right, and assumed duties which belonged to another to perform, is no excuse for not performing its contracts and discharging the duties which, for pay, it had assumed. Such a defence is, as Judge HOAR well says, in 13th Gray, *supra*, "like an innkeeper sued for lost luggage, alleging in defence that his landlord was without legal *title*, and therefore he was keeping inn without legal *right*."

An eminent public man in this state, construing the statute strictly, as town auditor, rejected the charge of the overseers for the expense of the *burial* of a town pauper, on the ground that the statute provides for the "*support*," and not the *burial* of the town's poor; that it was a provision for the *living*, and not the *dead*. It is difficult to find fault with this logic. But when the end and purpose of the statute is considered, that decision, subjected to the analysis of the average common-sense layman, would seem unreasonable and absurd. This corporation was authorized to build and keep in repair a bridge across a river, which was the dividing boundary of two states, and take tolls, and nothing more. But when it is considered that the end and purpose of the grant was to afford a feasible and safe transit from the highways of one state to the other, for teams and travellers, and that defendant constructed this appendage to its bridge structure, and made it fast to the bridge and under its roof, and maintained and used it, and invited travel over it for pay, and that for forty years, with his right unchallenged, *as a means of transit* from the highways of one state to the other, as between the corporation and the traveller and patrons who had paid toll, the defendant should be held responsible for the reasonable safety of the means provided for such passage.

We find no error, and the judgment of the County Court is affirmed.

The opinion in this case seems to rest upon such unquestionable grounds that we fear anything we may add, by way of comment or annotation, will have the appearance of an attempt to fortify what does not require it. But this being one of a class of cases considerably numerous in the courts, and to some extent in the reports, where the profession, and sometimes the courts even, seem to feel special satisfaction in devising some plausible grounds for defeating the plaintiff's claim, contrary to its general equity and justice, as if it were evidence of uncommon firmness in adhering to principles at the expense of justice, we may be justified in adding our testimony, as we have often done before, in favor of

following the general obvious justice of a case, where there are no invincible obstacles of a technical character in the way, and of showing our keenness of wit, if anywhere, rather in overcoming technical obstructions than in conjuring them up.

1. There seems to be no fair ground in this case to claim that the place where the defect existed which caused the injury, was not properly treated as a portion of the defendants' bridge. It was in a portion of the platform or passage from the main bridge to the road, which was constructed of planks and fastened by the defendants to the main structure of the bridge with spikes; and was under the cover of the bridge. This would seem to be a sufficient estoppel upon the defendants, to show that they could not deny it being part of the bridge. As between the defendants and the town, it seems very obvious that this place came fairly within the portion of the highway or bridge which it was the defendants' duty to maintain. But this is in fact wholly immaterial, as between the parties to this action. If the defendants took toll of the plaintiff for the use of their bridge, it was wholly immaterial whether they did it rightfully or not, as between them and other parties.

It is settled, by a uniform current of decisions, since the date of the common law almost, that any one in the possession and use of permanent property must keep it in a safe condition, so as not to cause injury to those whom he allows to use it or to come upon it. The rule has been applied to mere strangers, who paid nothing for the use of the same: *Barnes* v. *Ward*, 2 Carr. & K. 661. And the rule applies with special force where the party pays a toll for the use of a turnpike or plank road: *Randall* v. *Cheshire Turnp. Co.*, 6 N. H. 147; *Townshend* v. *Susquehanna Turnp. Co.*, 6 Johns. 90; *Davis* v. *Lamoille Co. P. Road Co.*, 27 Vt. 602. This question was very extensively and learnedly examined in the House of Lords, not many years back, in *The Mersey Docks & Harbor Co.* v. *Gibbs*, Law Rep. 1 Ho. Lds. 93; s. c. 12 Jur. N. S. 571, where it was held that the plaintiffs, although merely a public company, created for building and maintaining their works, for public use, and deriving no private emolument from the tolls collected for the building and repair of these docks, were nevertheless responsible for any injury suffered by any one in such use through default of repair, which defendants ought to have made. And in the very recent case of *Winch* v. *The Conservators of the Thames*, L. R. 9 C. P. 378, it was held that the mere fact of keeping open the tow-path on the upper Thames, and inviting travellers to use it for a toll, imposed the duty upon the defendants, as a public company, to keep the same in safe repair throughout its whole extent, or else to give warning of any existing defects. These public companies, in the last two cases, were held liable to the same extent as private companies doing the same thing. The cases are too numerous to require further citation to show that all turnpike or bridge companies taking toll for the use of their roads or bridges, are responsible for all injuries suffered by travellers through any defects or want of repair in such structures.

2. But it seems to have been claimed in this case that the defendants might excuse themselves by showing that they did not hold any legal title to maintain their bridge beyond the line of New Hampshire. They seemed to have obtained title to the land upon which the portion of the bridge in Vermont stood, and to have maintained the structure upon it, and used it as a portion of their toll-bridge for nearly forty years, more than twice the term of the Statute of Limitations in that state upon rights of entry upon land. This was no doubt perfect title as against all but the state, and would probably have barred even

the state from any proceeding to obtain a forfeiture of the right to maintain that portion of the bridge which was in Vermont, upon the ground of a presumptive grant by the state from such long acquiescence.

But without assuming that point, it is well settled that no such company, exercising the functions of granting passage for toll, whether a bridge or turnpike company, or a railway company, can escape from their otherwise legal responsibility on the ground of holding any portion of their structures by a defective title as against the state: *Feital* v. *Middlesex Ry.*, 109 Mass. 398; *McClure* v. *M. & L. Ry.*, 13 Gray 124; *Bissell* v. *Mich. So. & N. Ind. Ry.*, 22 N.Y. 258. But the rule may be carried much further. The plaintiff is not bound, in order to recover damages for an injury sustained in such case, through the negligence of companies in possession of turnpikes, bridges or railways, and demanding tolls for the use of the same, to prove that the defendants were rightfully entitled to receive such tolls. The fact that the defendants exercised the functions of owners, and received the lawful emoluments as such, is conclusive evidence against them that this was done rightfully. To suppose the contrary, involves an absurdity that few men, not largely schooled in dialectic refinements, could seriously entertain. If one should ride a horse over a child in the street and seriously injure it through mere carelessness, or allow one to enter his premises and fall down a trap-door not properly secured, we should never expect him to attempt to defend himself on the ground that he had not yet acquired full and perfect title to the horse or the farm. But when we come to apply the same reasoning to a public company, there seems to be something which renders it more plausible to allow such a defence than in the case of natural persons. We confess our inability to comprehend wherein the difference lies.

3. But in regard to the claim that the suit should have been against the town, if it could be clearly shown that the town had assumed to extend their highway over the place where the injury occurred, and thus made themselves primarily responsible for its repair, which seems to us not even a plausible construction or contention, in this case there would probably be some who, under such an assumption, might think the action should have been brought against the town. But so long as the injury occurred upon the bridge and its necessary approaches, which constitutes the entire structure for which toll was demanded by and paid to the defendants, they would be estopped to deny in the action that it was their bridge, or to claim that its maintenance and support rested upon any other person, natural or artificial. And it would make no difference in the result if there were no equitable estoppel upon the defendants in regard to recognising their responsibility for the safe condition of the entire structure for which they received toll of the plaintiff, and it were allowable to prove in the action, that some town or towns, or some one else, either in Vermont or New Hampshire, were equally responsible with the defendants, either jointly or independently, for keeping the entire bridge in repair, since it would impose no obligation upon the plaintiffs to go against such parties and not against defendants. It is no defence that other parties are equally liable for the same neglect or wrong for which defendants are sued: *Ricker* v. *Freeman*, 11 Am. Law Reg. N. S. 692; COLT, J., in *Eaton* v. *B. & L. Ry.*, 11 Allen 500; *Burrows* v. *M. G. & C. Co.*, L. R. 5 Exch. 67; s. c. 7 Id. 90. So that in any view we are able to take of the case it seems to rest upon most unquestionable grounds.

I. F. R.